



EUROPEAN COMMISSION

Directorate-General for Financial Stability, Financial Services and Capital Markets Union

Director general

Brussels, **25. 07. 2017**
FISMA 02/DB/el/Ares(2017)4149103

Registered letter with acknowledgment
of receipt

Ms. Margarida da Silva
Corporate Europe Observatory
26, rue d'Edimbourg
B - 1050 Bruxelles

**Subject: Your application for access to documents: reference number GESTDEM
2017/2106**

Dear Ms. da Silva,

We refer to your e-mail dated 5 April 2017 in which you make a request for access to documents, registered under the above mentioned reference number. Your request is as follows:

"Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting all exchanges between DG FISMA, including the Commissioner, his office and his Cabinet, and the law-firm Freshfields Bruckhaus Deringer LLP ("Freshfields").

Specifically, I would like to request any emails, correspondence, meeting notes or telephone call notes from the 1st of January 2014 until now".

Please accept our apologies for the time taken in answering your request.

After a search in our archives 26 documents have been identified as falling within the scope of your request.

I) Firstly, you will receive a partial access to 20 documents. Names of people working for external organisations and the names of civil servants in our Directorate-General below the level of Director as other personal data like phone number and e-mail addresses have been redacted in the documents.

Pursuant to Article 4(1) (b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data¹.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable².

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the documents requested expunged from this personal data.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, to make a confirmatory application requesting the Commission to review this position.

II) As regards the other 6 documents, I regret to inform you that the documents requested are covered by two of the exceptions provided for by the policy relating to access to documents and that they cannot be made available to you.

1) Article 4(2), first indent of Regulation (EC) No 1049/2001 provides that "the institutions shall refuse access to a document where disclosure would undermine the protection of (...) commercial interests of a natural or legal person (...)".

These six documents are linked with the activities of Freshfields Bruckhaus Deringer LLP in acting for its clients. The release of these documents would reveal the commercial activity of Freshfields in acting as a legal entity.

In this regard, it is useful to note that the "commercial interests" exception contained in the Regulation is an expression of the Commission's obligation of professional secrecy which is enshrined in Article 339 of the Treaty of the functioning of the European Union. The article stipulates that the Commission shall take all necessary precautions to ensure that the protection of information covered by the obligation of professional secrecy and other confidential information is not undermined. This applies in particular to 'information about undertakings, their business relations or their cost components'.

¹ Official Journal L 8 of 12.1.2001, p. 1

² Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, Commission/The Bavarian Lager Co. Ltd, ECR 2010 I-06055.

In its judgment in the Bank Austria case, the Court of Justice defined the notion of "professional secrecy" as information "(...) known to a limited number of persons and whose disclosure is liable to cause serious harm to the person who has provided it or to third parties, whereas the interests liable to be harmed by disclosure must be objectively worthy of protection".

2) Furthermore this correspondence is linked to an ongoing EU-CHAP (complaints) case.

It appears from our examination of these documents that they fall within the category of exceptions to disclosure provided for in Article 4(2), third indent, of Regulation No 1049/2001. That Article states that '(t)he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.'

The disclosure of the above mentioned CHAP documents might adversely affect the protection of the public interest and in particular the conduct of investigations liable to result in the opening of an infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFUE). The procedure laid down in Article 258 TFUE comprises two consecutive stages, the pre-litigation stage of an administrative nature and the contentious stage before the Court. Chap investigations enter in the pre-litigation stage and call for genuine co-operation and an atmosphere of mutual trust between the Commission and the Member State concerned so as to enable those two parties to open discussions with a view to rapid solution of the dispute.

Thus, the disclosure of documents on CHAP files might adversely affect the protection of the public interest and in particular the conduct of investigations liable to result in the opening of an infringement procedure under Article 258 of the TFUE.

The possibility of granting partial access to these six documents has been taken into consideration. However, it turned out that, after examination of the documents and for the reasons cited above, the documents are covered in their entirety by the exception above mentioned, so that the release of parts of the documents cannot be envisaged.

I note that in your application, you do not put forward any arguments demonstrating that the documents requested are not covered by the general presumption or that there is an overriding public interest in disclosure .

Therefore, I confirm my decision not to grant access to these documents, based on the exception of Article 4(2), third indent of Regulation 1049/2001.

Should you nevertheless wish to seek a review of this position, you may write to the Secretary-General of the Commission at the address below, confirming your initial request. You have 15 days from receipt of this letter in which to do so. After that period, your initial request will be considered as having been withdrawn.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P.P. Guersent', with a long horizontal stroke extending to the right.

Olivier GUERSENT

Enclosures: list of documents and documents 1 to 20